

Apr 07, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CLEONETTE U.,<sup>1</sup>  
Plaintiff,

vs.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>2</sup>  
Defendant.

No. 1:19-cv-03102-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 14, 15

<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

<sup>2</sup> Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant. *See* Fed. R. Civ. P. 25(d).

1 Before the Court are the parties' cross-motions for summary judgment. ECF  
2 Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No.  
3 7. The Court, having reviewed the administrative record and the parties' briefing,  
4 is fully informed. For the reasons discussed below, the Court denies Plaintiff's  
5 motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

### 6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

### 8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social  
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
11 limited; the Commissioner's decision will be disturbed "only if it is not supported  
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
15 (quotation and citation omitted). Stated differently, substantial evidence equates to  
16 "more than a mere scintilla[, ] but less than a preponderance." *Id.* (quotation and  
17 citation omitted). In determining whether the standard has been satisfied, a  
18 reviewing court must consider the entire record as a whole rather than searching  
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless  
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

## 12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within  
14 the meaning of the Social Security Act. First, the claimant must be “unable to  
15 engage in any substantial gainful activity by reason of any medically determinable  
16 physical or mental impairment which can be expected to result in death, or which  
17 has lasted or can be expected to last for a continuous period of not less than twelve  
18 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be  
19 “of such severity that he is not only unable to do his previous work[,] but cannot,  
20 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
2 423(d)(2)(A).

3       The Commissioner has established a five-step sequential analysis to  
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
5 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
6 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
7 “substantial gainful activity,” the Commissioner must find that the claimant is not  
8 disabled. 20 C.F.R. § 404.1520(b).

9       If the claimant is not engaged in substantial gainful activity, the analysis  
10 proceeds to step two. At this step, the Commissioner considers the severity of the  
11 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers  
12 from “any impairment or combination of impairments which significantly limits  
13 [his or her] physical or mental ability to do basic work activities,” the analysis  
14 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment  
15 does not satisfy this severity threshold, however, the Commissioner must find that  
16 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

17       At step three, the Commissioner compares the claimant’s impairment to  
18 severe impairments recognized by the Commissioner to be so severe as to preclude  
19 a person from engaging in substantial gainful activity. 20 C.F.R. §  
20 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and  
2 award benefits. 20 C.F.R. § 404.1520(d).

3 If the severity of the claimant's impairment does not meet or exceed the  
4 severity of the enumerated impairments, the Commissioner must pause to assess  
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
8 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's  
10 RFC, the claimant is capable of performing work that he or she has performed in  
11 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
12 capable of performing past relevant work, the Commissioner must find that the  
13 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
18 must also consider vocational factors such as the claimant's age, education, and  
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the  
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 404.1520(g)(1). If the claimant is not capable of adjusting to other work, analysis  
2 concludes with a finding that the claimant is disabled and is therefore entitled to  
3 benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.  
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
6 step five, the burden shifts to the Commissioner to establish that 1) the claimant is  
7 capable of performing other work; and 2) such work “exists in significant numbers  
8 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d  
9 386, 389 (9th Cir. 2012).

#### 10 **ALJ’S FINDINGS**

11 On April 27, 2015, Plaintiff applied for Title II disability insurance benefits  
12 alleging a disability onset date of April 28, 2014.<sup>3</sup> Tr. 114, 229-33. The  
13 application was denied initially and on reconsideration. Tr. 149-52; Tr. 155-61.  
14 Plaintiff appeared before an administrative law judge (ALJ) on October 24, 2017.  
15 Tr. 45-88. On May 1, 2018, the ALJ denied Plaintiff’s claim. Tr. 15-36.

16 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
17 who met the insured status requirements through March 31, 2019, has not engaged  
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19 <sup>3</sup> Plaintiff previously received a fully favorable decision on March 27, 2007. Tr.  
20 89-101. Plaintiff’s benefits ended when she returned to work. Tr. 55.

1 in substantial gainful activity since April 28, 2014. Tr. 21. At step two, the ALJ  
2 found that Plaintiff has the following severe impairments: rheumatoid arthritis,  
3 Sjogren's syndrome, mild degenerative disc disease, obesity and arthralgia. *Id.*

4 At step three, the ALJ found Plaintiff does not have an impairment or  
5 combination of impairments that meets or medically equals the severity of a listed  
6 impairment. Tr. 24-25. The ALJ then concluded that Plaintiff has the RFC to  
7 perform light work with the following limitations:

8 [Plaintiff] can frequently climb ramps and stairs; never climb ladders,  
9 ropes, or scaffolds; frequently balance; occasionally stoop, kneel,  
10 crouch, or crawl; must avoid concentrated exposure to extreme cold,  
heat, humidity, vibration, fumes, odors, gases, poor ventilation, and  
hazards.

11 Tr. 25.

12 At step four, the ALJ found Plaintiff is able to perform her past relevant  
13 work as a liquor manager and retail store manager. Tr. 29. Therefore, the ALJ  
14 concluded Plaintiff was not under a disability, as defined in the Social Security  
15 Act, from the alleged onset date of April 28, 2014, though the date of the decision.

16 Tr. 30.

17 On March 12, 2019, the Appeals Council denied review of the ALJ's  
18 decision, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for  
19 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).  
20

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner’s final decision denying  
3 her disability insurance benefits under Title II of the Social Security Act. Plaintiff  
4 raises the following issues for review:

- 5 1. Whether the ALJ properly developed the record;  
6 2. Whether the ALJ conducted a proper step-two analysis;<sup>4</sup>  
7 3. Whether the ALJ properly evaluated Plaintiff’s symptom claims; and  
8 4. Whether the ALJ properly evaluated lay witness evidence.

9 ECF No. 14 at 2.

10 **DISCUSSION**

11 **A. Record Development**

12 Plaintiff argues the ALJ improperly failed to fully develop the record. ECF  
13 No. 14 at 3-6.

14 The Plaintiff has a duty to submit, or inform the ALJ about, any written  
15 evidence no later than five business days before the hearing. 20 § C.F.R.  
16 404.935(a). If the Plaintiff misses the deadline, the ALJ must accept the untimely

17 \_\_\_\_\_  
18 <sup>4</sup> Plaintiff combined the arguments regarding the step-two analysis and the ALJ’s  
19 development of the record. For clarity, the Court addresses the arguments  
20 separately.

evidence if the ALJ has not yet issued a decision and one of the following exceptions applies:

1) A Social Security Administration (Administration) action misled the Plaintiff;

2) The Plaintiff's physical, mental, educational, or linguistic limitation(s) prevented Plaintiff from informing the Administration about or submitting the evidence earlier; or

3) Some other unusual, unexpected, or unavoidable circumstances beyond the Plaintiff's control prevented them from informing the Administration about or submitting the evidence earlier. Examples include, but are not limited to, serious illness, death or serious illness in immediate family, or Plaintiff actively and diligently sought evidence from a source and the evidence was not received or was received less than five business days prior to the hearing. 20 § C.F.R. 404.935(b).

Social Security Ruling (SSR) 17-4p further explains that representatives have a duty to act with reasonable promptness to help obtain information and evidence. Representatives are expected to submit or inform the Administration about evidence as soon as they obtain or become aware of the evidence. SSR 17-4p. Representatives are expected to submit the evidence unless they show that, despite good faith efforts, the representative could not obtain the evidence. *Id.*

1       The ALJ has an independent duty to fully and fairly develop a record in  
2 order to make a fair determination as to disability, even where, as here, the  
3 claimant is represented by counsel. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th  
4 Cir. 2003); *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001);  
5 *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996). The ALJ will assist in  
6 developing the record and may request existing evidence from a medical  
7 source/entity if the Plaintiff informed the ALJ of the evidence no later than five  
8 business days before the hearing, or if the Plaintiff informed the ALJ of the  
9 evidence after the deadline but one of the circumstances listed in 20 C.F.R. §  
10 404.935(b) applies. SSR 17-4p. If the ALJ finds Plaintiff met the requirements of  
11 20 C.F.R. § 404.935 and the Plaintiff needs assistance obtaining the records, the  
12 ALJ will make an initial request for the evidence and will send one follow-up 10 to  
13 20 calendar days after the initial request, if the evidence has not been received. *Id.*  
14 “Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to  
15 allow for proper evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an  
16 appropriate inquiry.’” *See Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen*, 80 F.3d  
17 at 1288).

1           1. *Physical therapy records*

2           Plaintiff contends the ALJ erred by declining to hold the record open for  
3 receipt of Plaintiff's physical therapy records. ECF No. 14 at 4-6.

4           Plaintiff first informed the Social Security Administration of her physical  
5 therapy at Arizona Rehab when Plaintiff requested reconsideration of the initial  
6 denial of benefits. Tr. 315-16. She reported receiving treatment for her back from  
7 October 28, 2015 through December 2, 2015. *Id.* The adjudicator requested the  
8 records, but they were not received. Tr. 155.

9           Plaintiff appointed a representative on June 21, 2016. Tr. 162. On June 5,  
10 2017, Plaintiff's representative received a list of exhibits from Plaintiff's case file.  
11 Tr. 345-55. At that time, the representative was on notice of which records were in  
12 the file and had the ability to determine which records were outstanding. The  
13 record contained a clear indication that the adjudicator had requested, but not  
14 received, records from Rehab Arizona. Tr. 155.

15           On August 16, 2017, the representative requested assistance obtaining some  
16 of Plaintiff's records. Tr. 356-57. The Administration requested those records.  
17 Tr. 361. Although Plaintiff contends Arizona Rehab was on the list, ECF No. 16 at  
18 2, Arizona Rehab was not listed on the request; as such, the records were not  
19 requested by the Administration. On October 17, 2017, the representative sent  
20

1 notice to the ALJ that there were outstanding records from Rehab Arizona for  
2 treatment from April 2014 through the present time. Tr. 369-70.

3 At the October 24, 2017 hearing, Plaintiff's representative, Ms. Guerra,  
4 stated records from Rehab Arizona were still outstanding. Tr. 50. Ms. Guerra  
5 stated that on October 9, 2017, she saw a mention of the physical therapy in the  
6 records, but noted the records were never obtained. Tr. 51. Ms. Guerra contacted  
7 Plaintiff to confirm the location of the physical therapy and requested the Rehab  
8 Arizona records on October 9, 2017. *Id.* Ms. Guerra explained Plaintiff had not  
9 mentioned this therapy location to her office before and the office noticed the  
10 reference to the records for the first time in October 2017. Tr. 52-53. However,  
11 the ALJ noted Ms. Guerra's office was appointed on June 21, 2016, and the  
12 records reportedly existed in 2014. Tr. 52. The ALJ found there was not good  
13 cause for the delay in obtaining the records and declined to hold the record open  
14 for the Rehab Arizona records. Tr. 53.

15 Plaintiff argues she and her representative gave a good faith effort to obtain  
16 the records and complied with the regulations by informing the ALJ of the  
17 outstanding records five business days before the hearing. ECF No. 14 at 4-5.  
18 Plaintiff argues Ms. Guerra's office did not have access to the file until June 2017  
19 and requested the records as soon as her office determined in October 2017 that  
20 there were outstanding records. *Id.*

1 Ms. Guerra stated she reviewed the file when she was assigned to the case.  
2 Tr. 51. While Ms. Guerra may have been first assigned the case in October 2017,  
3 she did not offer an explanation as to why a review of the file did not find this  
4 information between June 2017, when the office first received access to the file,  
5 and October 2017. Ms. Guerra stated she saw the reference to physical therapy in  
6 the records and confirmed the location with Plaintiff, Tr. 51, but the record clearly  
7 indicates there were outstanding records from Arizona Rehab, Tr. 155. Ms. Guerra  
8 did not offer an explanation as to why Plaintiff did not obtain the records herself  
9 nor report the outstanding records earlier to her representative, as Plaintiff was  
10 notified the Administration did not receive the records. *Id.* Ms. Guerra's office  
11 requested assistance obtaining multiple records in August 2017 but did not provide  
12 an explanation as to why the Arizona Rehab records were not on that request. Tr.  
13 356-57.

14 Given the unexplained five-month delay in ordering the Arizona Rehab  
15 records and notifying the ALJ of the outstanding records, the ALJ's determination  
16 that there was not good cause for the untimely submission of the records is  
17 supported by substantial evidence. Further, any error in the ALJ's determination  
18 would be harmless. *See Molina*, 674 F.3d at 1115.

19 The Rehab Arizona records were never submitted to the ALJ nor the  
20 Appeals Council. Given the Social Security Administration's prior attempts to

1 obtain the records were unsuccessful, and the Plaintiff never submitting the  
2 records, it is not clear that these records exist. There are conflicting reports  
3 regarding how long Plaintiff was seen at Rehab Arizona. Tr. 315, 370. Records in  
4 2015 reference Plaintiff being referred for only six weeks of physical therapy. Tr.  
5 599. This is consistent with Plaintiff's report that she was treated from October 28,  
6 2015 through December 2, 2015. Tr. 315. Plaintiff makes no arguments as to  
7 what evidence would be contained in the five weeks of physical therapy records  
8 that is not contained elsewhere in the records from the same time period, nor how  
9 those records would impact the ALJ's decision. As such, any error would be  
10 harmless.

11 *2. Dr. Jackson's questionnaire*

12 Plaintiff contends the ALJ erred by failing to hold the record open for a  
13 questionnaire completed by Dr. Jackson. ECF No. 14 at 4-6.

14 Ms. Guerra notified the ALJ on October 17, 2017 that Plaintiff's provider,  
15 Dr. Jackson, was previously provided with a questionnaire that she expected Dr.  
16 Jackson to complete. Tr. 372. At the hearing, Ms. Guerra stated her office was  
17 still hoping to receive the questionnaire but had not yet received it. Tr. 50. Ms.  
18 Guerra stated her office sent the questionnaire to Dr. Jackson and re-sent it once  
19 but was unaware of any further follow-ups or communication with Dr. Jackson.  
20 Tr. 53. Ms. Guerra reported Plaintiff "might" see Dr. Jackson on November 24,

1 2017. Tr. 85. No questionnaire form Dr. Jackson was submitted after the hearing  
2 nor at the Appeals Council level.

3 Plaintiff argues the ALJ erred by not holding the record open for a  
4 questionnaire from Dr. Jackson. ECF No. 14 at 5-6. Plaintiff argues she complied  
5 with the regulations because the questionnaire was requested more than a month  
6 before the hearing, it was followed up on, and the ALJ was informed the  
7 questionnaire was requested five business days before the hearing. *Id.* However,  
8 Plaintiff's counsel had represented Plaintiff since July 2016, Tr. 162, and had  
9 access to the electronic file beginning June 2017, when it would have been clear  
10 the file did not contain any treating opinions, Tr. 345-55. Plaintiff's counsel did  
11 not request the questionnaire until approximately one month before the hearing.  
12 ECF No. 14 at 5. The questionnaire was re-sent to Dr. Jackson, but there is not  
13 evidence of further follow-up and there was no communication with Dr. Jackson.  
14 Tr. 53. Plaintiff does not contend there were any further follow-ups or  
15 communication with Dr. Jackson.

16 Plaintiff has not offered an explanation as to why the questionnaire could not  
17 be obtained from Dr. Jackson at an earlier date before the hearing. Plaintiff also  
18 did not offer an explanation as to why she was only intending to see Dr. Jackson  
19 one month after the hearing, and not at an earlier date to complete the  
20

1 questionnaire. The ALJ's finding that there was not good cause for the delay in  
2 obtaining Dr. Jackson's questionnaire is supported by substantial evidence.

3 Further, any error would be harmless. *See Molina*, 674 F.3d at 1115.  
4 Plaintiff did not submit a questionnaire from Dr. Jackson after the hearing nor at  
5 the Appeals Council level. There is no evidence that the questionnaire exists, and  
6 if it does exist, Plaintiff makes no arguments regarding the content of the  
7 questionnaire impacting the ALJ's decision beyond arguing the decision lacked  
8 support because of the lack of a more recent opinion, which is addressed below.  
9 Thus, any error would be harmless.

### 10 3. Consultative exam/medical expert

11 Plaintiff argues the ALJ failed to properly develop the record by declining to  
12 order a consultative examination (CE) or call on a medical expert to testify. ECF  
13 No. 14 at 6. "Ambiguous evidence, or the ALJ's own finding that the record is  
14 inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty  
15 to 'conduct an appropriate inquiry.'" *See Tonapetyan*, 242 F.3d at 1150 (quoting  
16 *Smolen*, 80 F.3d at 1288).

17 Here, the ALJ considered Plaintiff's request for a consultative exam, Tr. 87,  
18 but determined there was adequate evidence to make a determination, Tr. 19.  
19 Plaintiff contends there was inadequate evidence to allow for a proper  
20 determination, as the ALJ relied on opinions from reviewing doctors from 2015

1 and 2016. ECF No. 14 at 6. Plaintiff argues the inadequate record triggered the  
2 ALJ's duty to obtain further evidence. *Id.* Defendant argues the evidence was  
3 neither ambiguous nor inadequate, and the ALJ's determination was supported by  
4 three reviewing doctor's opinions and medical records generally showing mild  
5 findings. ECF No. 15 at 17.

6 Plaintiff does not point to any ambiguities in the record but argues only that  
7 the record was inadequate for a determination. The ALJ relied on three reviewing  
8 doctor opinions. Tr. 28-29 (citing Tr. 102-13, 115-28, 130-45). The ALJ also  
9 relied on records from Plaintiff's primary care provider, rheumatologist, pain  
10 management, and other providers. Tr. 26. These records included physical  
11 examinations, lab results and imaging. Tr. 26-27. The ALJ noted that Plaintiff had  
12 a large gap in treatment, followed with reported improvement with treatment. Tr.  
13 25-27. There is adequate evidence in the record on which the ALJ relied in  
14 making her determination. As such, her duty to further develop the case was not  
15 triggered and the ALJ did not error in declining to order a CE or consult a medical  
16 examiner. *See Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen*, 80 F.3d at 1288).

## 17 **B. Step Two**

18 Plaintiff contends the ALJ erred at step two by failing to identify her  
19 hyperlipidemia, hypertension, sleep apnea, diabetes, peripheral neuropathy,  
20 sinusitis, osteopenia, diverticulosis, osteoarthritis of the hips, allergic rhinitis,

1 vitamin D deficiency, depression, systemic lupus erythematosus, Raynaud's  
2 syndrome, chronic pain syndrome and fibromyalgia as severe impairments. ECF  
3 No. 14 at 8-10. At step two of the sequential process, the ALJ must determine  
4 whether claimant suffers from a "severe" impairment, i.e., one that significantly  
5 limits her physical or mental ability to do basic work activities. 20 C.F.R. §  
6 404.1520(c). To show a severe impairment, the claimant must first prove the  
7 existence of a physical or mental impairment by providing medical evidence  
8 consisting of signs, symptoms, and laboratory findings; the claimant's own  
9 statement of symptoms alone will not suffice. 20 C.F.R. § 404.1521.

10       An impairment may be found to be not severe when "medical evidence  
11 establishes only a slight abnormality or a combination of slight abnormalities  
12 which would have no more than a minimal effect on an individual's ability to  
13 work...." SSR 85-28 at \*3. Similarly, an impairment is not severe if it does not  
14 significantly limit a claimant's physical or mental ability to do basic work  
15 activities; which include walking, standing, sitting, lifting, pushing, pulling,  
16 reaching, carrying, or handling; seeing, hearing, and speaking; understanding,  
17 carrying out and remembering simple instructions; responding appropriately to

1 supervision, coworkers and usual work situations; and dealing with changes in a  
2 routine work setting. 20 C.F.R. § 404.1522(a); SSR 85-28.<sup>5</sup>

3 Step two is “a de minimus screening device [used] to dispose of groundless  
4 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying  
5 our normal standard of review to the requirements of step two, [the Court] must  
6 determine whether the ALJ had substantial evidence to find that the medical  
7 evidence clearly established that [Plaintiff] did not have a medically severe  
8 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687  
9 (9th Cir. 2005).

10 The ALJ found Plaintiff’s systemic lupus erythematosus, Raynaud’s, chronic  
11 pain syndrome and fibromyalgia were not established medically determinable  
12 impairments. Tr. 22-23. The ALJ found Plaintiff’s hyperlipidemia, hypertension,  
13 sleep apnea, diabetes, peripheral neuropathy, sinusitis, osteopenia, diverticulosis,  
14 osteoarthritis of the hips, allergic rhinitis, vitamin D deficiency and depression  
15 were non-severe as they were either untreated or became well-controlled with  
16 treatment and caused no more than mild limitations. Tr. 21-23.

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18  
19 <sup>5</sup> The Supreme Court upheld the validity of the Commissioner’s severity  
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54  
(1987).

1 Plaintiff contends the ALJ's step-two finding is not supported by the  
2 evidence because the ALJ's determination differed from the reviewing provider's  
3 opinions. ECF No. 14 at 8-10. Dr. Wright found Plaintiff's fibromyalgia,  
4 peripheral neuropathy and COPD were severe, Plaintiff's obesity was non-severe,  
5 and that degenerative disc disease and rheumatoid arthritis were not medically  
6 determinable impairments. Tr. 108-09. Dr. Hurley gave the same opinion, Tr. 122,  
7 and Dr. Orfei affirmed the opinion, Tr. 138. The ALJ's severity determinations  
8 conflict with the reviewing doctors' opinions on all five of the conditions the ALJ  
9 found to be severe, and three of the conditions the ALJ found to not be severe  
10 impairments. Plaintiff argues the ALJ improperly substituted her own opinion for  
11 that of the reviewing doctors, without relying on other evidence or authority in the  
12 record. ECF No. 14 at 9-10.

13 Plaintiff lists all of the conditions the ALJ addressed in the severity  
14 determination but only sets forth an argument as to why the fibromyalgia  
15 determination was unsupported. *Id.* at 8. While the ALJ's severity determination  
16 differed from the reviewing doctors, the ALJ relied on other medical evidence in  
17 making this determination. Plaintiff contends the ALJ improperly rejected Dr.  
18 Kim's opinion that Plaintiff has fibromyalgia, as the ALJ did not give specific and  
19 legitimate reasons for finding fibromyalgia to not be a severe medically  
20

1 determinable impairment. *Id.* at 10 (citing *Garrison v. Colvin*, 759 F.3d 995, 1012  
2 (9th Cir. 2014)).

3       The ALJ considered SSR 12-2p, which sets forth the two criteria by which a  
4 claimant may be found to have a medically determinable impairment of  
5 fibromyalgia. Tr. 23. SSR 12-2p indicates that the 1990 ACR criteria requires that  
6 the claimant have 11 or more tender points, and those points must be found  
7 bilaterally and above and below the waist. The ALJ found that while Dr. Byrd's  
8 examination showed more than 11 tender points, the locations of the points were  
9 not documented. *Id.* (citing Tr. 756). Additionally, based on the exam, the  
10 diagnoses were history of rheumatoid arthritis, arthralgia, and sicca, suggesting  
11 potential other causes for her symptoms; while fibromyalgia was noted as a  
12 potential diagnosis, it was not diagnosed based on the examination. Tr. 23 (citing  
13 Tr. 756). Dr. Byrd also noted additional testing was needed, suggesting that other  
14 causes had not yet been ruled out, as required by SSR 12-2p. Tr. 756.

15       Dr. Kim later added fibromyalgia to Plaintiff's list of diagnoses and started  
16 Plaintiff on a medication for fibromyalgia. Tr. 640. However, Dr. Kim's  
17 diagnosis was made after noting that Dr. Byrd "suspects fibromyalgia", and Dr.  
18 Kim did not perform a tender point exam. Tr. 639. Without documentation of the  
19 locations of the tender points, Plaintiff cannot meet the 1990 ACR criteria for  
20 fibromyalgia. SSR 12-2p. The 2010 ACR criteria requires repeated manifestation

1 of six or more fibromyalgia symptoms, signs or co-occurring conditions. *Id.*  
2 Plaintiff does not set forth an argument that she meets the 2010 criteria but cites  
3 only to the tender point examination as evidence of fibromyalgia. ECF No. 14 at  
4 10. The ALJ gave specific and legitimate reasons for rejecting the finding that  
5 fibromyalgia is a severe medically determinable impairment, and her step-two  
6 analysis is supported by substantial evidence.

7       Additionally, even if the ALJ should have determined that fibromyalgia, or  
8 any other condition, is a severe impairment, any error would be harmless because  
9 the step was resolved in Plaintiff's favor. *See Stout v. Comm'r of Soc. Sec. Admin.*,  
10 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th  
11 Cir. 2005). Plaintiff makes no showing that any of the conditions mentioned create  
12 limitations not already accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10  
13 (the party challenging the ALJ's decision bears the burden of showing harm).  
14 Plaintiff's argument rests primarily on the fact that the ALJ's severity  
15 determination differs from the reviewing doctors' severity determinations,  
16 however, the ALJ's RFC is identical to the RFC set forth by the reviewing doctors.  
17 Tr. 25, 109, 124, 138. Plaintiff contends the step-two analysis was a harmful error  
18 because the ALJ did not develop the record, relied on her own medical judgments,  
19 and found Plaintiff's symptom allegations inconsistent with the record. As  
20 addressed above, the ALJ did not have a duty to further develop the record in this

1 case and she relied on evidence in the record in making her determination.  
2 Plaintiff does not set forth an argument as to which symptom claims were  
3 improperly rejected due to the severity determination. Thus, the ALJ's step two  
4 finding is legally sufficient.

### 5 **C. Plaintiff's Symptom Claims**

6 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
7 convincing in discrediting her symptom claims. ECF No. 14 at 11-20. An ALJ  
8 engages in a two-step analysis to determine whether to discount a claimant's  
9 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
10 "First, the ALJ must determine whether there is objective medical evidence of an  
11 underlying impairment which could reasonably be expected to produce the pain or  
12 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).  
13 "The claimant is not required to show that [the claimant's] impairment could  
14 reasonably be expected to cause the severity of the symptom [the claimant] has  
15 alleged; [the claimant] need only show that it could reasonably have caused some  
16 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

17 Second, "[i]f the claimant meets the first test and there is no evidence of  
18 malingering, the ALJ can only reject the claimant's testimony about the severity of  
19 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
20 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations

omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s symptom claims)). “The clear and convincing [evidence] standard is the most demanding required in Social Security cases.” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

Factors to be considered in evaluating the intensity, persistence, and limiting effects of a claimant’s symptoms include: 1) daily activities; 2) the location, duration, frequency, and intensity of pain or other symptoms; 3) factors that precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side effects of any medication an individual takes or has taken to alleviate pain or other symptoms; 5) treatment, other than medication, an individual receives or has received for relief of pain or other symptoms; 6) any measures other than treatment an individual uses or has used to relieve pain or other symptoms; and 7) any other factors concerning an individual’s functional limitations and restrictions due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§ 404.1529(c), 416.929 (c). The ALJ is instructed to “consider all of the evidence in

1 an individual's record," "to determine how symptoms limit ability to perform  
2 work-related activities." SSR 16-3p, 2016 WL 1119029, at \*2.

3 The ALJ found that Plaintiff's medically determinable impairments could  
4 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's  
5 statements concerning the intensity, persistence, and limiting effects of her  
6 symptoms were not entirely consistent with the evidence. Tr. 26.

7 First, the ALJ found Plaintiff's statements inconsistent with her treatment  
8 history. *Id.* Unexplained, or inadequately explained, failure to seek treatment or  
9 follow a prescribed course of treatment may serve as a basis to discount the  
10 claimant's reported symptoms, unless there is a good reason for the failure. *Orn v.*  
11 *Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). The effectiveness of treatment is also a  
12 relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§  
13 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm'r of Soc. Sec. Admin.*, 439  
14 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions effectively controlled  
15 with medication are not disabling for purposes of determining eligibility for  
16 benefits); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (recognizing  
17 that a favorable response to treatment can undermine a claimant's complaints of  
18 debilitating pain or other severe limitations).

19 Here, Plaintiff had a gap in treatment until the middle of 2015. Tr. 26 (citing  
20 Tr. 400, 402). The ALJ considered Plaintiff's testimony that she lacked insurance

1 during the gap in treatment but the ALJ noted Plaintiff also did not receive  
2 emergency or low or no-cost treatment during the time. Tr. 26. Plaintiff contends  
3 the lack of insurance explains the gap in treatment but does not offer an  
4 explanation as to why she did not seek any low or no-cost treatment. ECF No. 14  
5 at 15-17. The ALJ also found Plaintiff did not have any rheumatology treatment  
6 even when insured, causing a five to six-year gap in rheumatology treatment,  
7 though a portion of that time period falls during the time when Plaintiff reported  
8 improvement. *Id.* (citing Tr. 384).

9       The ALJ further reasoned Plaintiff did not follow up on all of her prescribed  
10 treatment; she was previously prescribed anti-rheumatic medications, which she  
11 did not take for a period of time, Tr. 26 (citing Tr. 651), and she received only one  
12 injection during the relevant time for her pain, though she reported they had  
13 helped, Tr. 465, 639, 647. Plaintiff contends the ALJ did not consider Plaintiff's  
14 adverse effect from the injection causing her desire to not have further injections,  
15 ECF No. 16 at 7, but Plaintiff does not explain why she did not have any further  
16 injections after she learned the injection procedure had changed, and Plaintiff had  
17 said she may be interested in the new procedure, Tr. 830.

18       Additionally, when she received treatment, Plaintiff generally had a good  
19 response to treatments. Tr. 26 (citing Tr. 378, 385, 390, 392, 400, 416, 418, 465,  
20 630, 636, 820). Plaintiff did not challenge the ALJ's finding that Plaintiff had

1 improvement with treatment in the opening brief but stated in her reply the ALJ's  
2 citations to objective evidence showing improvement do not support rejecting  
3 Plaintiff's allegations. ECF No.16 at 8. The cited evidence shows Plaintiff  
4 consistently had improvement in her symptoms with treatment. *See, e.g.*, Tr. 378-  
5 79 (stable COPD, stable hypertension, controlled diabetic polyneuropathy, stable  
6 diabetes, stable back pain); Tr. 385 (no evidence of inflammatory arthritis); Tr. 390  
7 (improved pain symptoms, controlled hyperlipidemia, stable COPD, hypertension  
8 and back pain); Tr. 416, 418 (stable sedimentation rate); Tr. 630-31 (doing well  
9 with CPAP, stable fibromyalgia symptoms). This was a clear and convincing  
10 reason, supported by substantial evidence, to reject Plaintiff's symptom claims.

11         Second, the ALJ found the objective evidence was inconsistent with  
12 Plaintiff's allegations of disabling limitations. Tr. 26. An ALJ may not discredit a  
13 claimant's symptom testimony and deny benefits solely because the degree of the  
14 symptoms alleged is not supported by objective medical evidence. *Rollins v.*  
15 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,  
16 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*,  
17 400 F.3d at 680. However, the objective medical evidence is a relevant factor,  
18 along with the medical source's information about the claimant's pain or other  
19 symptoms, in determining the severity of a claimant's symptoms and their  
20 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2).

1       The ALJ reasoned the imaging and physical examinations were inconsistent  
2 with Plaintiff's allegations. Tr. 26. Imaging of Plaintiff's hands, feet and lumbar  
3 spine were generally normal, with no more than mild findings. Tr. 26-27 (citing Tr.  
4 448, 451, 605-07, 611, 630, 655-56, 658, 780, 813, 815). On exam, Plaintiff had  
5 only mild effusion and no synovitis. Tr. 26 (citing Tr. 456, 471, 631, 642-43, 756,  
6 785). Her foot examination was normal in 2017. Tr. 26 (citing Tr. 722). While  
7 Plaintiff had some tenderness and pain on exam, and some positive straight leg  
8 tests, Tr. 587, she had no lower extremity weakness, Tr. 827, and her back pain  
9 improved with treatment, Tr. 636, leading to normal stability, strength, range of  
10 motion and straight leg tests, Tr. 785. While Plaintiff alleged significant numbness  
11 and limitations due to neuropathy, as well as shooting pains into her lower  
12 extremities, her examination showed only mild sensory loss and no evidence of  
13 radiculopathy or myopathy. Tr. 543. Despite some abnormal upper extremity  
14 examination findings, Tr. 456 (strength four to five out of five); Tr. 466, 593, 598  
15 (shoulder pain and weakness), the reviewing doctors found Plaintiff does not have  
16 any manipulative limitations. Tr. 110, 124, 141. This was a clear and convincing  
17 reason, supported by substantial evidence, to reject Plaintiff's symptom claims.

18       Third, the ALJ found Plaintiff's work history was inconsistent with her  
19 allegations. Tr. 28. An ALJ may consider that a claimant stopped working for  
20 reasons unrelated to the allegedly disabling condition when weighing the

1 claimant's symptom reports. *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir.  
2 2001). Additionally, "receipt of unemployment benefits can undermine a  
3 claimant's alleged inability to work fulltime." *Carmickle v. Comm'r of Soc. Sec.*  
4 *Admin.*, 533 F.3d 1155, 1161-62 (9th Cir. 2008) (citing *Copeland v. Bowen*, 861  
5 F.2d 536, 542 (9th Cir. 1988)). But where the record "does not establish whether  
6 [the claimant] held himself out as available for full-time or part-time work," such a  
7 "basis for the ALJ's credibility finding is not supported by substantial evidence,"  
8 as "[o]nly the former is inconsistent with his disability allegations." *Id.*

9 Here, Plaintiff's alleged onset date corresponds to the closure of her  
10 employer's business, rather than the job ending due to her conditions. Tr. 28, 55.  
11 Plaintiff contends the business closed due to her no longer being able to work  
12 there, ECF No. 14 at 12, however, Plaintiff testified the employer no longer wanted  
13 to run the business, and he would need to hire additional people to help run it if  
14 Plaintiff could not perform all the tasks she previously had. Tr. 56. Plaintiff  
15 testified she had begun having difficulties with her job prior to her alleged onset  
16 date, but she received no treatment during that time. Tr. 28, 58-59. The ALJ's  
17 finding that Plaintiff's work ended at her alleged onset date for a reason unrelated  
18 to her impairments is a reasonable interpretation of the evidence.

19 Plaintiff testified that she "didn't work for a long time" due to her  
20 symptoms, during the period when she was previously awarded benefits, and as

1 she improved, she returned to work part-time and increased her hours with time.  
2 Tr. 58. The ALJ found this testimony inconsistent with Plaintiff's work history  
3 and earnings, which show she worked at the substantial gainful activity level from  
4 2006 through 2010 and again in 2013. Tr. 28 (citing Tr. 275). The Plaintiff's  
5 earnings only dropped below the substantial gainful activity threshold from 2004  
6 through 2005, while her application for benefits was pending, until it later dropped  
7 again. Tr. 275.

8 Plaintiff also received unemployment benefits in 2014 and testified that she  
9 had received job offers after her last employment ended. Tr. 28, 71. The record  
10 does not indicate if Plaintiff held herself out as able to work full-time or part-time,  
11 therefore the ALJ erred in discounting Plaintiff's claims due to her receipt of the  
12 benefits. *See Carmickle*, 533 F.3d at 1161-62. However, this error was harmless,  
13 as the ALJ relied on other clear and convincing reasons to reject Plaintiff's  
14 symptom claims.

15 On this record, the ALJ reasonably concluded that Plaintiff's allegations  
16 were inconsistent with her treatment history, objective evidence and work history.  
17 These findings were supported by substantial evidence and were clear and  
18 convincing reasons to discount Plaintiff's symptom complaints.

1       **D. Lay Witness Evidence**

2       Plaintiff contends the ALJ erred in rejecting lay witness statements. ECF  
3 No. 14 at 20-21. An ALJ must consider the statement of lay witnesses in  
4 determining whether a claimant is disabled. *Stout*, 454 F.3d at 1053. Lay witness  
5 evidence cannot establish the existence of medically determinable impairments,  
6 but lay witness evidence is “competent evidence” as to “how an impairment affects  
7 [a claimant’s] ability to work.” *Id.*; 20 C.F.R. § 404.1513; *see also Dodrill v.*  
8 *Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) (“[F]riends and family members in a  
9 position to observe a claimant’s symptoms and daily activities are competent to  
10 testify as to her condition.”). If a lay witness statement is rejected, the ALJ ““must  
11 give reasons that are germane to each witness.”” *Nguyen v. Chater*, 100 F.3d 1462,  
12 1467 (9th Cir. 1996) (citing *Dodrill*, 12 F.3d at 919).

13       *1. Ms. Schraufnagel*

14       Winnie Schraufnagel, Plaintiff’s sister, provided a statement regarding  
15 Plaintiff’s functioning. Tr. 367. Ms. Schraufnagel stated Plaintiff has difficulty  
16 driving and seeing, she experiences shortness of breath from walking and has  
17 difficulty walking. *Id.* She reported Plaintiff needs breaks to sit down and needs  
18 assistance with household chores, including lifting items above elbow-height. *Id.*  
19 The ALJ gave Ms. Schraufnagel’s statement limited weight. Tr. 29.

1       The ALJ found Ms. Schraufnagel's statement described Plaintiff's condition  
2 as declining compared to her prior functioning. Tr. 29 (citing Tr. 367). The ALJ  
3 reasoned a decline in functioning is not sufficient for a finding of disability. Tr.  
4 29. Moreover, the ALJ also found Ms. Schraufnagel's statements were  
5 inconsistent with the objective evidence. *Id.* Inconsistency with the medical  
6 evidence is a germane reason for rejecting lay witness testimony. *See Baylis v.*  
7 *Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 511-  
8 12 (9th Cir. 2001) (germane reasons include inconsistency with medical evidence,  
9 activities, and reports). Here, the ALJ found Plaintiff's lack of a diagnosed visual  
10 impairment was inconsistent with Ms. Schraufnagel's statement, as was the  
11 evidence of Plaintiff having normal lower extremity strength. Tr. 29. Plaintiff  
12 argues the ALJ erred by not discussing Ms. Schraufnagel's statement that Plaintiff  
13 cannot lift items above her elbow, as Plaintiff also testified that she cannot lift  
14 overhead, and the ALJ did not address the limitation. ECF No. 14 at 21.

15       While the ALJ only specifically pointed to evidence related to Plaintiff's  
16 vision and lower extremities in this portion of the opinion, the overall record is  
17 inconsistent with Ms. Schraufnagel's statements, given generally normal  
18 examinations and no more than mild findings. *See, e.g.*, Tr. 669, 722, 809.  
19 Elsewhere in the decision, the ALJ discussed Plaintiff's hand imaging showing  
20 only mild osteopenia and degenerative changes, and normal strength. Tr. 26-27,

1 780. Plaintiff had no evidence of rheumatoid arthritis of inflammatory arthritis in  
2 2015. Tr. 27 (citing Tr. 456). Plaintiff also had no joint synovitis and only mild  
3 effusion. Tr. 27 (citing Tr. 456, 471, 631, 642-43, 756, 785). The ALJ found that  
4 based on the evidence, it was unnecessary to provide manipulative limitations. Tr.  
5 27. Plaintiff's back imaging showed only mild findings, which the ALJ found  
6 supported no more of a restrictive RFC than a limitation to light work. *Id.* (citing  
7 Tr. 655-56, 813, 815). Additionally, the ALJ gave significant weight to the  
8 opinions of the State agency consultants, Tr. 28-29, both of whom found Plaintiff  
9 had no limitations in reaching, Tr. 110, 124. The ALJ gave germane reasons to  
10 reject Ms. Schraufnagel's statement.

11 2. *Ms. Rojas*

12 Christy Rojas, Plaintiff's niece, provided a statement regarding Plaintiff's  
13 functioning on June 12, 2018. Tr. 374. Plaintiff submitted the letter four days  
14 before the hearing. Tr. 223. As discussed above, 20 C.F.R. § 404.935(a) requires  
15 that claimants submit or inform the ALJ about evidence no later than five business  
16 days before the hearing. The ALJ will accept untimely evidence if one of the  
17 reasons listed in 20 C.F.R. § 404.935(b) applies.

18 The ALJ declined to admit Ms. Rojas' statement. Tr. 18. The ALJ reasoned  
19 that while Plaintiff's representative submitted a letter informing the ALJ of  
20 outstanding letters more than five business days before the hearing, the letter did

1 not say who would be authoring the letters, and the representative did not provide  
2 an explanation as to why the letters were not obtained sooner. Tr. 18-19. At the  
3 Appeals Council level, Plaintiff argued she could not control when a third party  
4 provided a letter. Tr. 224. However, Plaintiff did not offer an explanation as to  
5 how she actively and diligently sought the evidence; there is no information as to  
6 when she requested the letter, nor any follow-up attempts to obtain the letter.

7 Plaintiff now argues Ms. Rojas' statement was newly submitted evidence to  
8 the Appeals Council, which the Appeals Council erred by not crediting. ECF No.  
9 14 at 21. The Appeals Council will review a case if it receives additional evidence  
10 that is new and material and that relates to the period on or before the date of the  
11 ALJ decision, and it finds there is a reasonable probability that the additional  
12 evidence would change the outcome of the case. 20 C.F.R. § 404.970(a)(5).  
13 However, the Appeals Council will only consider additional evidence when  
14 deciding whether to review a case if the claimant shows good cause for not  
15 meeting the five-day rule because of one of the reasons listed in 20 C.F.R. §  
16 404.935(b). If the claimant submits new evidence and the Appeals Council does  
17 not find that the claimant had good cause for the untimely submission of the  
18 evidence, the Appeals Council will send the claimant a notice that explains why it  
19 did not accept the additional evidence. 20 C.F.R. § 404.970(c). When the Appeals  
20 Council considers new evidence in declining review, that evidence becomes part of

1 the administrative record, which this court must consider in determining whether  
2 the ALJ's decision is supported by substantial evidence. *Brewes v. Comm'r of Soc.*  
3 *Sec. Admin.*, 682 F.3d 1157, 1159-60 (9th Cir. 2012).

4 Plaintiff submitted Ms. Rojas' statement to the Appeals Council. Tr. 374.  
5 The Appeals Council included Ms. Rojas' statement as an exhibit, and made it a  
6 part of the record, indicating it was considered. Tr. 5-6. The Appeals Council  
7 found the evidence, and Plaintiff's arguments, did not provide a basis for changing  
8 the ALJ's decision. Tr. 1. By considering the evidence, the Appeals Council  
9 appears to have found Plaintiff had good cause for the late submission of the  
10 evidence. As the evidence is a part of the record, this Court must now determine  
11 whether substantial evidence supports the ALJ's decision, when adding Ms. Rojas'  
12 statement to the record. *Brewes*, 682 F.3d at 1159-60.

13 Ms. Rojas' stated Plaintiff cannot lift heavy objects or reach above her head,  
14 she has trouble breathing and naps from exhaustion. Tr. 374. She reported  
15 Plaintiff has difficulty with chores, has ongoing pain and fatigue, and has had  
16 decreased socialization. *Id.* She reported Plaintiff now needs assistance with  
17 multiple tasks. *Id.* Ms. Rojas' statement does not contain any evidence that is not  
18 already contained elsewhere in the record. Plaintiff and Ms. Schraufnagel  
19 provided the same information as Ms. Rojas. Tr. 73, 306-09, 325-33, 367. As  
20

1 such, the addition of Ms. Rojas' statement does not impact the ALJ's decision; the  
2 decision remains supported by substantial evidence.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the  
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. The District Court Executive is directed to substitute Andrew M. Saul as  
8 the Defendant and update the docket sheet.

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

10 3. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

11 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

12 The District Court Executive is directed to file this Order, provide copies to  
13 counsel, and **CLOSE THE FILE**.

14 DATED April 7, 2020.

15 *s/Mary K. Dimke*

16 MARY K. DIMKE

17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20